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IN THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

ANTHONY A. ARCEO,

Petitioner,

v.

ROBERT AYERS, Warden,

Respondent.

CV 07-2131-W (BLM)

**ANSWER TO PETITION FOR
WRIT OF HABEAS CORPUS;
MEMORANDUM OF POINTS
AND AUTHORITIES IN
SUPPORT OF ANSWER**

Courtroom: 5
Judge: The Honorable
Barbara L. Major

Respondent Robert J. Hernandez, Warden of the R. J. Donovan
Correctional Facility,^{1/} submits this Answer to the Petition for Writ of Habeas
Corpus filed by Petitioner Anthony Arceo. Respondent denies all allegations set
forth in the Petition and makes the following assertions:

1. The Petition names Robert Ayers as the Respondent; however, the proper
Respondent is Robert J. Hernandez, the warden of the facility in which Arceo is
incarcerated.

1 1. Arceo is properly in the custody of the California Department of
2 Corrections and Rehabilitation (Department) serving a sentence of thirty-one years
3 for one count of kidnapping with intent to commit rape, one count of forcible oral
4 copulation, and two counts of rape by foreign object. (Lodg. 1.) Arceo does not
5 challenge the validity of his convictions or of his imposed sentence. Rather, Arceo
6 challenges the Department's revocation of certain good-time credits after he was
7 convicted of serious disciplinary violations.

8 2. Respondent denies Arceo exhausted his state court remedies and
9 asserts Arceo procedurally defaulted on his claims. Arceo filed a habeas corpus
10 petition in the Kern County Superior Court on December 1, 2006. (Lodg. 2.) The
11 superior court denied relief for untimeliness and failure to exhaust administrative
12 remedies. (Lodg. 3, pp. 25-26.) The superior court rejected Arceo's proposed
13 justification for the delay in presenting his claims. (Lodg. 3, p. 26.) Arceo sought
14 relief from the Fifth Appellate District of California, but the court denied his
15 petition without comment or citation. (Lodgs. 4-5.) On April 9, 2007, Arceo filed
16 a petition for review in the California Supreme Court, but the petition was returned
17 as unfiled because the time for seeking review had lapsed. (Lodg. 6.)

18 3. Respondent denies the Petition was timely filed within the one-year
19 limitations period of 28 U.S.C. § 2244. Arceo claims he was improperly assessed
20 with 120-day credit losses in 1997. Arceo did not pursue judicial relief on those
21 credit losses until 2006, long after the one-year limitations period had lapsed.
22 Thus, the Petition is untimely and is barred by the applicable statute of limitations.

23 4. Respondent denies Arceo has demonstrated his claims warrant federal
24 review or any relief under the Antiterrorism and Effective Death Penalty Act.
25 Arceo has neither alleged nor established that the state court adjudications were
26 contrary to, or unreasonable applications of, clearly established federal law.

27 5. Respondent submits that Arceo's claims raise only questions of law.
28 Neither discovery nor an evidentiary hearing would be appropriate in this matter.

1 6. Except as expressly admitted herein, Respondent denies each
2 allegation of the Petition. Specifically, Respondent denies that Arceo's
3 constitutional rights have been violated in any way. Respondent further denies that
4 Arceo is entitled to the relief sought or to any other relief. The Answer is based
5 upon the attached Memorandum of Points and Authorities, the lodgments attached
6 to the Notice of Lodgment filed herewith, and the records and files in this case, all
7 of which are incorporated herein by reference.

8 Respondent requests that the Petition be denied and this matter be
9 dismissed.

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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **ARGUMENT**

3 **I.**

4 **ARCEO IS BARRED FROM FEDERAL REVIEW HERE**
 5 **BECAUSE HE PROCEDURALLY DEFAULTED IN STATE**
 6 **COURT WHICH IS AN INDEPENDENT AND ADEQUATE**
 7 **STATE GROUND FOR DENYING RELIEF.**

8 “The independent and adequate state ground doctrine prohibits the federal
 9 courts from addressing the habeas corpus claims of state prisoners when a state-law
 10 default prevented the state court from reaching the merits of the federal claims.”

11 *Thomas v. Lewis*, 945 F.2d 1119, 1122 (9th Cir. 1991); *see also Kibler v. Walters*,
 12 220 F.3d 1151, 1153 (9th Cir. 2000). Here, Arceo procedurally defaulted in three
 13 ways: (1) failing to litigate his claims in a timely manner; (2) failing to exhaust
 14 administrative remedies before seeking judicial relief; and (3) failing to present a
 15 timely petition for review to the California Supreme Court.

16 California state law bars habeas corpus claims that are raised with
 17 unjustified delay. *In re Sanders*, 21 Cal.4th 697, 703 (Cal. 1999); *In re Clark*, 5
 18 Cal.4th 750, 759 (Cal. 1993). An inmate may justify delay by alleging “with
 19 specificity, facts showing when information offered in support of the claim was
 20 obtained, and that the information was neither known, nor reasonably should have
 21 been known, at any earlier time” *In re Gallego*, 18 Cal.4th 825, 833 (Cal.
 22 1998). Arceo failed to satisfy this burden in state court. Arceo argued that a 2004
 23 California appellate court decision gave rise to his habeas corpus claims and that
 24 he sought relief as soon as he became aware of that decision. (Lodg. 2.) The
 25 superior court rejected this justification, noting that the cited decision did not
 26 establish any new law and that Arceo could have discovered the predicate for his
 27 claim well before that decision was rendered. (Lodg. 3.)

28 California law also requires exhaustion of administrative remedies prior to
 seeking habeas corpus relief. *In re Dexter*, 25 Cal.3d 921, 925 (Cal. 1979) (“As a

1 general rule, a litigant will not be afforded judicial relief unless he has exhausted
2 available administrative remedies.”). The Kern County Superior Court ruled that
3 Arceo had failed to exhaust administrative remedies and dismissed his claims on
4 this ground. (Lodg. 3.)

5 Finally, a litigant must file a petition in the California Supreme Court for
6 review of an appellate court decision no later than ten days after the appellate court
7 decision is final. (Cal. R. Court 8.500(e).) Here, the clerk of the California
8 Supreme Court returned Arceo’s petition for review as unfiled because it was
9 untimely filed. (Lodg. 6.) As such, Arceo’s petition for review was not properly
10 presented before the Supreme Court due to his failure to comply with a state
11 procedural rule.

12 Federal review is inappropriate where the state court’s decision rests on a
13 state procedural ground that is independent of the federal question raised by the
14 habeas corpus claims. *See Coleman v. Thompson*, 501 U.S. 722, 729, 111 S.Ct.
15 2546, 2553 (1991). Where, as here, a state court denies relief on procedural
16 grounds without addressing the merits, “the state judgment rests on independent
17 and adequate state procedural grounds.” *Id.* at 729-30, 111 S.Ct. at 2554; see
18 *Tacho v. Martinez*, 862 F.2d 1376, 1378 (9th Cir. 1988). A federal court does not
19 consider whether the state court properly applied its procedural rules— “[th]is court
20 accepts a state court ruling on questions of state law.” *High v. Ignacio*, 408 F.3d
21 585, 590 (9th Cir. 2005).

22 Here, Arceo had procedurally defaulted and the challenged state court
23 decisions did not address the merits of his claims. As such, this Court is foreclosed
24 from addressing the merits of Arceo’s claims. *Tacho*, 862 F.2d at 1379 (“Based
25 upon precedent, we think it readily apparent that because none of the state courts
26 addressed the merits of petitioner's claim of ineffective assistance of counsel for
27 failure to call alibi witnesses, the federal courts are likewise foreclosed from
28 addressing the merits of petitioner's constitutional claim.”).

Arceo's procedural defaults forfeited his right to federal review absent a demonstration of cause and actual prejudice. *Thomas*, 945 F.2d at 1123. Alternatively, Arceo may show that the procedural rule "is not firmly established and consistently applied." *Forrest v. Vasquez*, 75 F.3d 562, 564 (9th Cir. 1996). Arceo's misinterpretation of California state law is no basis upon which this Court might excuse his state procedural defaults or otherwise grant federal review. For these reasons, Arceo's claims are barred here.

II.

THE PETITION IS UNTIMELY AND MUST BE DISMISSED.

The Antiterrorism and Effective Death Penalty Act (AEDPA) establishes a one-year limitations period within which a state prisoner may seek habeas corpus relief. 28 U.S.C. § 2244(d)(1). This statute of limitations governs all habeas corpus applications filed after April 24, 1996. *Shelby v. Bartlett*, 391 F.3d 1061, 1065 (9th Cir. 2004). AEDPA bars any untimely petition from federal review, even if the delay caused no prejudice. *Ferguson v. Palmateer*, 321 F.3d 820, 822 (9th Cir. 2003).

a. The Statute Of Limitations Began To Run When Arceo Received A Disciplinary Penalty Assessing A Credit Loss.

AEDPA's statute of limitations runs from the latest of four triggering events. *See* 28 U.S.C. § 2244(d)(1)(A)-(D). The event triggering the limitations period here is: "the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence." § 2244(d)(1)(D).

Arceo asserts that he was punished with a 120-day credit loss for the manufacture or possession of alcohol in a prison facility, and that the maximum penalty for such a violation is a credit loss of thirty-days. Arceo submitted prison rules violation reports showing these credit losses. (Exs. J2, J4 of Petn.; *see* Lodg.

1 7.) The disciplinary penalties were imposed on December 2, 1997 and July 16,
2 1996. (Exs. J3-J4 of Petn., Lodg. 7.) Arceo learned at the respective disciplinary
3 hearing that he was assessed a 120-day credit penalty. Thus, the limitations period
4 began when the Department imposed credit losses on December 2, 1997 and July
5 16, 1996.

6 **b. The Limitations Period Lapsed Before Arceo Sought**
7 **Habeas Corpus Relief On His Claims.**

8 AEDPA tolls the limitations period only when “. . . a properly filed
9 application for State post-conviction or other collateral review with respect to the
10 pertinent judgment or claim is pending” 28 U.S.C. § 2244(d)(2). However, if
11 the limitations period lapses before the claim is presented to the state courts, the
12 tolling provision does not restart or revive the limitations period. *Laws v.*
13 *Lamarque*, 351 F.3d 919, 922 (9th Cir. 2003); *see also Ferguson v. Palmateer*, 321
14 F.3d 820, 823 (9th Cir. 2003) (“Like the Eleventh Circuit, we hold that section
15 2244(d) does not permit the reinitiation of the limitations period that has ended
16 before the state petition was filed.”)

17 Arceo first filed a state court petition on August 18, 2006, well after the
18 limitations periods had lapsed. (Ex. E of Petn.) By failing to seek judicial relief
19 before expiration of the statute of limitations, Arceo relinquished his right to
20 federal review and the state courts became his sole avenue for relief. *See*
21 *Ferguson*, 321 F.3d at 823. Arceo’s baseless and erroneous interpretation of
22 California law is no justification for any equitable tolling or for re-starting the
23 limitations period. *See Johnson v. United States*, 544 U.S. 295, 311, 125 S.Ct.
24 1571, 1582 (2005) (“But we have never accepted pro se representation alone or
25 procedural ignorance as an excuse for prolonged inattention when a statute’s clear
26 policy calls for promptness, and on this record we think Johnson fell far short of
27 reasonable diligence in challenging the state conviction.”). Therefore, AEDPA
28 bars any relief here.

1 III.

2 **EVEN ASSUMING FEDERAL REVIEW IS APPROPRIATE**
3 **HERE, THE PETITION FAILS TO STATE ANY GROUND**
4 **FOR HABEAS CORPUS RELIEF.**

5 If this Court deems federal review appropriate here, the Petition must
6 nevertheless be denied because Arceo's claims have no basis. Arceo argues that
7 his 120-day credit penalties for the manufacture or possession of alcohol in a state
8 prison exceeded the maximum of thirty-days permissible under California state
9 law. However, under California law, a prison may impose up to a 120-day credit
10 forfeiture for "[t]he fermentation or distillation of materials in a manner consistent
11 with the production of alcohol or the physical possession of alcohol in an
12 institution/facility or contract health facility." Cal. Code Regs. tit. 15,
13 § 3323(e)(11).

14 In the Petition, Arceo argues that a thirty-day credit forfeiture is the
15 maximum penalty for a disciplinary violation that could not be prosecuted as a
16 misdemeanor or felony. Arceo asserts that his 120-day credit forfeitures exceeded
17 the maximum thirty-day penalty because his disciplinary violations could not be
18 prosecuted as a misdemeanor or felony. *See* Cal. Penal Code § 2932(a)(4); see also
19 *In re Dikes*, 121 Cal.App.4th 825, 833-34 (Cal. Ct. App. 2004). There is no basis
20 for this claim.

21 The California Penal Code prohibits, as a felony, the unauthorized
22 possession of any alcoholic beverage in a state prison. Cal. Penal Code § 4573.5.
23 Any disciplinary violation that could be prosecuted as a felony maybe punished
24 with a credit forfeiture of up to 180 days. Cal. Penal Code § 2932(a)(2). Here,
25 either of Arceo's disciplinary violations could have been prosecuted as a felony.
26 As such, the 120-day credit forfeitures were permissible under state law. *See id*;
27 *see also* Cal. Code Regs. tit. 15, § 3323(e).

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CONCLUSION

The Petition must be denied because Arceo presents no claims appropriate for federal review. Arceo had procedurally defaulted on his claims in state court, and the state courts denied relief on state law grounds that were independent of the federal issue and adequate to support the judgment. Additionally, the Petition was untimely filed after AEDPA's one-year limitations period had expired. As such, Arceo's claims are barred from federal review and the Petition must be denied.

Dated: February 19, 2008

Respectfully submitted,

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